FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MAR 27 2013

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RE: MUR 6727
Friends of Weiner and Nelson Braff,
in his official capacity as treasurer

Dear Mr. Sandstrom:

On June 14, 2012, the Federal Election Commission (the "Commission") notified your clients, Friends of Weiner and Nelson Braff, in his official capacity as treasurer (the "Committee"), of RR 12L-26 indicating that, in the normal course of carrying out its supervisory responsibilities, the Commission became aware of information suggesting the Committee may have violated the Federal Election Campaign Act of 1971, as amended (the "Act"). On March 14, 2013, the Commission opened MUR 6727 and found reason to believe that the Committee violated 2 U.S.C. § 441a(f), a provision of the Act. Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determination.

Please note that your clients have a legal obligation to preserve all documents, records and materials relating to this matter until such time as the Committee is notified that the Commission has closed its file in this matter. *See* 18 U.S.C. § 1519. In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless your clients notify the Commission in writing that they wish the investigation to be made public.

We look forward to your response.

On behalf of the Commission,

Ellen L. Weintraub

Ellen L. Weintraub
Chair

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: Friends of Weiner and Nelson Braff in his official capacity as treasurer

MUR 6727

I. INTRODUCTION

This matter was generated based on information ascertained by the Federal Election Commission (the "Commission") in the normal course of carrying out its supervisory responsibilities. *See* 2 U.S.C. § 437g(a)(2).

II. FACTS

Weiner was an incumbent candidate for the 2012 election in New York's 9th Congressional District. On June 16, 2011, prior to the 2012 primary, Weiner withdrew his candidacy. The Committee's 2011 April Quarterly and 2011 July Quarterly Reports disclosed that, prior to Weiner's withdrawal, the Committee received general election contributions from 27 individuals totaling $66,700.[1]

On January 31, 2012, RAD sent the Committee a Request for Additional Information ("RFAI") regarding the Committee's 2011 October Quarterly Report.[2] The RFAI noted that the Act requires that the Committee refund or redesignate all general election contributions within 60 days of a candidate's announcement not to seek election and requested that the Committee take corrective action with respect to the general election contributions it reported in its prior disclosure reports.[3]

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1 *See* RAD Referral, Attach. 2, 3.

2 *See* RAD Referral at 2.

3 *Id.*

On February 23, 2012, the Committee filed a Miscellaneous Electronic Document ("Form 99") in response to the RFAI, which states, in part, that no general election contributions were used to promote Weiner's election, the Committee refunded contributions to all those who requested a refund, and that the Committee properly used funds in its campaign account, as permitted under 11 C.F.R. § 113.2, to pay "the ordinary and necessary expenses incurred in connection with the Congressman's duties as holder of federal office including costs associated with the winding down of the Congressional office."[4] In March and April 2012, RAD had several discussions with the Committee's counsel regarding the 2012 general election contributions. RAD explained that pursuant to Commission regulations at 11 C.F.R. § 110.1(b)(3)(C) and other guidance, including Advisory Opinions, contributions designated for a general election from which a candidate withdraws must be redesignated or refunded within 60 days of the candidate's withdrawal from the race.[5] In response, Counsel again asserted the Committee's legal arguments concerning the permissible uses of campaign funds.[6] Counsel also noted that the Committee was planning to terminate and did not have the resources available to refund the contributions.[7]

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4 *Id.*

5 *Id.* at 2-4.

6 Counsel argued that Commission regulations pertaining to the permissible uses of campaign funds (at 11 C.F.R. §§ 113.1, 113.2) are inconsistent with the provisions requiring the refund of general election contributions when a candidate does not participate in that election (at 11 C.F.R. §§ 102.9(e)(3) and 110.1(b)(3)(C)), and noted that the Campaign Guide indicates that "campaign funds may be used for such purposes" not "*some* campaign funds may be used" when discussing permissible uses of funds. RAD Referral at 4. Counsel also asserted that candidates running in a primary election often use general election funds to pay for expenses related to the general election. *Id.* at 3.

7 *Id.* at 4.

III. LEGAL ANALYSIS

Under the Federal Election Campaign Act of 1971, as amended ("the Act"), an individual may not make a contribution to a candidate with respect to any election in excess of the limits at 2 U.S.C. § 441a(a)(1)(A). Candidates and political committees are prohibited from knowingly accepting excessive contributions.[8] The contribution limits are applied separately with respect to each election.[9] A primary election and general election are each considered an "election."[10]

The Commission's regulations permit a candidate's committee to receive contributions for the general election prior to the primary election.[11] If, however, the candidate does not become a candidate in the general election, the committee must: (1) refund the contributions designated for the general election; (2) redesignate such contributions in accordance with 11 C.F.R. §§ 110.1(b)(5) or 110.2(b)(5); or (3) reattribute such contributions in accordance with 11 C.F.R. § 110.1(k)(3).[12] The committee must do so within 60 days of the date that the committee has actual notice of the need to obtain redesignations or refund the contributions, such as the date the candidate loses the primary or withdraws from the campaign.[13]

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8 *See* 2 U.S.C. § 441a(f).

9 *See* 2 U.S.C. § 441a(a)(6); 11 C.F.R. § 110.1(j).

10 *See* 2 U.S.C. § 431(1)(A); 11 C.F.R. § 100.2.

11 *See* 11 C.F.R. § 102.9(e)(1). The committee must employ an acceptable accounting method to distinguish between primary and general election contributions. *Id.* The committee's records must demonstrate that prior to the primary election, the committee's recorded cash on hand was at all times equal to or in excess of the sum of general election contributions received less the sum of general election disbursements made. *See* 11 C.F.R. § 102.9(e)(2).

12 *See* 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), 110.2(b)(3)(i). *See also* Advisory Op. 1992-15 (Russo) at 2 ("Nonetheless, the Commission concludes that for losing primary candidates, like Mr. Russo, who receive contributions before the primary election that are designated for the general election, redesignation within 60 days of the primary election date would be permissible."); Advisory Op. 2007-03 (Obama for America) at 3 ("If a candidate fails to qualify for the general election, any contributions designated for the general election that have been received from contributors who have already reached their contribution limit for the primary election would exceed FECA's contribution limits.").

13 *See* Advisory Op. 2008-04 (Dodd); Advisory Op. 1992-15 (Russo).

In this matter, the Committee accepted contributions totaling $66,700 that were designated for the 2012 general election but were not redesignated, reattributed or refunded within 60 days after the candidate's withdrawal from the primary.[14] A review of the Committee's disclosure reports shows that each general election contributor had already contributed the maximum amount allowable for the primary election, and therefore these contributions became excessive when the candidate withdrew from the primary.[15]

Prior to the referral, the Committee had argued that 11 C.F.R. § 113.2(a) permits a campaign to use any funds in its campaign accounts, including funds that do not comply with the limits of the Act, to pay "the ordinary and necessary expenses incurred in connection with the Congressman's duties as holder of federal office including the costs associated with the winding down of the Congressional office."[16] However, the Respondent's reliance on this regulation, which concerns how campaign funds may be used rather than the funds' sources or permissibility, is misplaced. The purpose of section 113.2(a) is to implement FECA's personal use provisions (2 U.S.C. § 439a) by listing certain exceptions to the general rule prohibiting non-campaign use of funds. Thus, the regulation allows candidates to use campaign funds to pay for office wind-down costs and other limited expenses without violating the Act's prohibition on personal use. However, implicit in this regulation is the requirement that the funds used for the listed purposes constitute permissible campaign funds under subpart 110 of the Commission's regulations. Subpart 110 addresses, *inter alia*, whether contributions were permissibly *received* by a candidate (*e.g.* within the contribution limitations) and does not address any *uses* of such

[14] *See* 11 C.F.R. § 102.9(e)(3).

[15] *See* 11 C.F.R. § 110.1(b)(5)(iii).

[16] *See* RAD Referral at 2.

funds (other than a refund, redesignation, or reattribution). Before any inquiry can be made as to whether funds were permissibly used under section 113.2, those funds must first be properly received under subpart 110, and, in this instance, they were not.

As outlined above, a primary and general election are each considered an "election" to which separate contribution limits apply, and a committee may not knowingly accept an excessive contribution.[17] Therefore, a committee that receives general election contributions prior to the primary election must separately account for primary and general election contributions and must refund, redesignate, or reattribute those general election contributions if the candidate ultimately does not participate in the general election.[18] Here, the Committee received contributions designated for the general election from contributors who had made their aggregate maximum allowable contribution to the candidate with respect to the primary election. Because the candidate withdrew from the primary, no separate contribution limit with respect to the general election was available to the contributors to the Committee. Accordingly, the general election contributions were excessive contributions, and the Committee was required to refund, redesignate or reattribute those contributions within 60 days of the candidate's withdrawal from the primary. *See, e.g.*, Advisory Op. 1980-122 (Myerson) (stating that a candidate who lost the primary election and had received contributions designated for the general election from individuals who had exhausted their contribution limits for the primary election could not use the general election contributions to pay for outstanding primary election debts or closing down expenses and must return those contributions). *Id.*

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17 *See* 2 U.S.C. §§ 431(1)(A) 441a(a)(1)(A), 441a(a)(6), 441a(f); 11 C.F.R. §§ 100.2, 102.9, 110.1.

18 *See* 11 C.F.R. §§ 102.9(e)(3), 110.1(b)(3)(i), 110.2(b)(3)(i).

Here, the Committee failed to refund, redesignate or reattribute general election contributions within 60 days after the candidate's withdrawal from the primary. Therefore, the Commission found reason to believe the Committee violated 2 U.S.C. § 441a(f) by knowingly accepting excessive contributions.